

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\*\*\*\*\*

IN THE MATTER OF APPLICATION TO CHANGE A )  
WATER RIGHT NO. 40A 30005100 BY BERG RANCH )  
CO./RICHARD BERG )

FINAL ORDER

\*\*\*\*\*

The proposal for decision in this matter was entered on January 7, 2005. None of the parties filed timely written exceptions or requested an oral argument hearing pursuant to ARM 36.12.229.

Therefore, the Department of Natural Resources and Conservation (Department) hereby adopts and incorporates by reference the Findings of Fact and Conclusions of Law in the Proposal for Decision entered January 7, 2005.

Based on the record in this matter, the Department makes the following order:

**ORDER**

Application to Change a Water Right No. 40A-30005100 is hereby **DENIED**.

**NOTICE**

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department for preparation of and payment for the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 21<sup>st</sup> day of MARCH, 2005.



Jack Stults, Administrator  
Water Resources Division  
Department of Natural Resources and Conservation  
PO Box 201601  
Helena, MT 59620-1601

## CERTIFICATE OF SERVICE

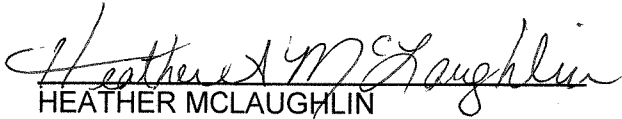
This certifies that a true and correct copy of the Final Order was served upon all parties listed below on this 22<sup>nd</sup> day of March, 2005 by first class United States mail.

BERG RANCH COMPANY  
RICHARD J BERG  
40 BERG RD  
MARTINSDALE MT 59053

OTTO W OHLSON  
PO BOX 358  
WHITE SULPHUR SPRINGS MT 59645

ROBERT GOFFENA  
152 GOFFENA RD  
ROUNDUP MT 59072

DNRC WATER RESOURCES  
LEWISTOWN REGIONAL OFFICE  
SCOTT IRVIN  
ANDY BRUMMOND  
613 NE MAIN STE E  
LEWISTOWN MT 59457-2020

  
HEATHER MCLAUGHLIN  
HEARINGS UNIT  
406-444-6615

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

\*\*\*\*\*

**IN THE MATTER OF APPLICATION TO CHANGE A ) NOTICE AND ORDER REGARDING  
WATER RIGHT NO. 40A 30005100 BY BERG RANCH ) EXCEPTIONS TO PROPOSAL FOR  
CO./RICHARD BERG ) DECISION**

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The proposal for decision in this matter was entered on January 7, 2005. The time period for filing timely written exceptions expired January 27, 2005. None of the parties filed timely written exceptions or requested an oral argument hearing pursuant to ARM 36.12.229. After the time for filing written exceptions expired, the Hearing Examiner noticed that the proposal for decision was mailed to the Applicant in this matter at the wrong address. The Department of Natural Resources and Conservation (Department) erred by sending the proposal for decision to an address different from that provided by the applicant.

The Applicant may be adversely affected by the proposal because the proposal recommended denial of the application. The Applicant is entitled to notice of the proposal for decision and 20 days to file exceptions pursuant to ARM 36.12.229.


Therefore, I make the following order:

**ORDER**

Upon good cause shown, the Applicant in this matter has 20 days from the date of service of this order to file written exceptions to the proposal for decision. To show good cause, the applicant may include with any written exceptions a statement indicating that the applicant did not receive the proposal for decision in a timely manner and, consequently, was unable to file written exceptions by the deadline set in the proposal for decision.

Written exceptions must be filed with the Hearing Examiner and served on Objector Goffena. If written exceptions are filed, Objector Goffena has 20 days from the date of service of written exceptions to file responses to the exceptions.

Dated this 10<sup>th</sup> day of February, 2005.

  
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Mary Vandebosch, Hearing Examiner  
Water Resources Division  
Department of Natural Resources and Conservation  
PO Box 201601  
Helena, MT 59620-1601  
(406) 444-6835

## CERTIFICATE OF SERVICE

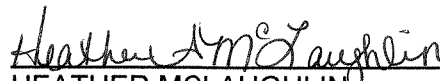
This certifies that a true and correct copy of the Notice & Order Regarding Exceptions to Proposal for Decision was served upon all parties listed below on this 10<sup>th</sup> day of February, 2005 by first class United States mail.

BERG RANCH COMPANY  
RICHARD J BERG  
40 BERG RD  
MARTISNDALE MT 59053

OTTO W OHLSON  
PO BOX 358  
WHITE SULPHUR SPRINGS MT 59645

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152 GOFFENA RD  
ROUNDUP MT 59072

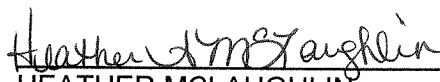
DNRC WATER RESOURCES  
LEWISTOWN REGIONAL OFFICE  
SCOTT IRVIN  
ANDY BRUMMOND  
613 NE MAIN STE E  
LEWISTOWN MT 59457-2020

  
HEATHER MCLAUGHLIN  
HEARINGS UNIT  
406-444-6615

## CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Proposal For Decision was served upon all parties listed below on this 10<sup>th</sup> day of February, 2005 by first class United States mail.

BERG RANCH COMPANY  
RICHARD J BERG  
40 BERG RD  
MARTISNDALE MT 59053

  
\_\_\_\_\_  
HEATHER MCLAUGHLIN  
HEARINGS UNIT  
406-444-6615

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3  
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**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

\*\*\*\*\*

5

<b>IN THE MATTER OF APPLICATION TO CHANGE ) A WATER RIGHT NO. 40A 30005100 BY BERG ) RANCH CO/RICHARD BERG )</b>	<b>PROPOSAL FOR DECISION</b>
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6 Pursuant to the Montana Water Use Act (Title 85, Chapter 2, Mont. Code Ann.) and to  
7 the contested case provisions of the Montana Administrative Procedure Act, and after notice  
8 required by Mont. Code Ann. § 85-2-307, a hearing was held on November 3, 2004 in  
9 Harlowton, Montana to determine whether an authorization to change water right claim number  
10 40A-146045-00 should be issued to Richard J. Berg and Berg Ranch Company, hereinafter  
11 referred to as "Applicant" for the above application, under the criteria set forth in Mont. Code  
12 Ann. § 85-2-402.

13

**APPEARANCES**

14 Applicant Richard Berg appeared at the hearing in his own behalf.  
15 Otto Ohlson testified for the Applicant.  
16 Objector Robert Goffena appeared at the hearing in his own behalf.  
17 Andy Brummond, Terri Hice, Richard Haxton, and Keith Svenstad testified for Objector  
18 Goffena.

19

**EXHIBITS**

20 Applicant offered, and the Hearing Examiner accepted and admitted into evidence,  
21 Applicant's exhibits A-1, A-2, A-3, A-4, A-5, A-6, A-7, and A-8.

22 Applicant's **Exhibit A-1** is a topographic map that shows the points of diversion (POD)  
23 for water right numbers 40A-146045 and 40A-146039.

24 Applicant's **Exhibit A-2** is a topographic map showing "Proposed change to Big Gun  
25 Sprinkler," the proposed pump site, ditches, and ditch lengths.

26 Applicant's **Exhibit A-3** is a document entitled "Irrigation Water Requirements – Crop  
27 Data Summary" dated 10/25/2004.

28 Applicant's **Exhibit A-4** is a chart showing staff gauge readings for the Thomas Ditch for  
29 June and July of 2003.

30 Applicant's **Exhibit A-5** is a chart showing staff gauge readings for the Lennep Ditch for  
31 May and June of 2003.

1 Applicant's **Exhibit A-6** is a table prepared by Otto Ohlson showing flows and volumes  
2 of water diverted in the Thomas Ditch for the 2003 irrigation year.

3 Applicant's **Exhibit A-7** is a table prepared by Otto Ohlson showing flows and volumes  
4 of water diverted in the Lennep Ditch for the 2003 irrigation year.

5 Applicant's **Exhibit A-8** is an affidavit from David Voldseth regarding flows from Comb  
6 Creek into the South Fork of the Musselshell River.

7 Having reviewed the record in this matter and being fully advised in the premises, I make  
8 the following:

9 **FINDINGS OF FACT**

10 **Application and Environmental Review**

11 1. Application to Change a Water Right No. 40A-30005100, in the name of Richard J. Berg  
12 and Berg Ranch Company and signed by Richard J. Berg, was filed with the Department of  
13 Natural Resources and Conservation (Department) on January 22, 2003. (Department file)

14 2. The Environmental Assessment prepared by the Department for this application was  
15 reviewed and is included in the record of this proceeding. (Department file)

16 3. Applicant proposes to add a point of diversion for water right claim number 40A-146045-  
17 00 into the Thomas Ditch from the South Fork Musselshell River at a point in the SE¼, SW¼,  
18 SW¼ of Section 29, Township 8N, Range 10E, Meagher County. Water is currently diverted  
19 into the Lennep Ditch at a point in the NW¼, NW¼, NW¼ of Section 31, Township 8N, Range  
20 10E, Meagher County. (Department file)

21 4. Applicant proposes to divert water at a maximum rate of 2 cubic feet per second (cfs) to  
22 irrigate 26.3 acres from the additional point of diversion (the Thomas Ditch) instead of the  
23 existing point of diversion (the Lennep Ditch) during periods of dryer than normal precipitation  
24 and runoff.<sup>1</sup> Applicant proposes to continue to use the existing point of diversion to irrigate this  
25 parcel in years with normal and above normal streamflow. When the additional point of  
26 diversion is used, Applicant will reduce diversions into the Lennep ditch so that no more than  
27 the claimed flow of 11.75 cfs is diverted for this water right at one time. Applicant proposes to  
28 remove 12 acres from irrigation when the additional point of diversion is used. (Department file,  
29 Testimony of Richard Berg.) The application submitted to the Department proposed that the  
30 new point of diversion be used to irrigate 38.3 acres. (Department file) Mr. Berg modified his  
31 proposal during the hearing.

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<sup>1</sup> The existing point of diversion is shown as a red circle on the Attachment (Exhibit A-2) as "POD 146045." The additional point of diversion is labeled "POD" on the same map.

5. I find that other persons are not prejudiced by the modification to the application to reduce the number of acres irrigated because a reduction in the number of acres irrigated would not increase the potential for adverse effect on other water users.

#### **Historic Water Use**

6. I find that the Applicant has irrigated the 26.3 acres that he proposes to irrigate from the proposed additional point of diversion in **some years**. (Department file, Testimony of Richard Berg) However, I find that the Applicant has not been able to irrigate or fully irrigate the 26.3 acres proposed to be irrigated during periods of dryer than normal precipitation and runoff, referred to herein as “**dry years**.” The supplement to the “Application to Change a Water Right” that was filed by Mr. Berg states that the Applicant has had considerable difficulty getting adequate flows down this length of ditch and still having adequate water to provide irrigation. This difficulty is attributed to the drought of the 4 years prior to filing the application. (Department file) Mr. Ohlson testified that it is difficult to get adequate water around the ditch to irrigate in dry years. The acres proposed to be irrigated were not irrigated in 2003. (Testimony of Otto Ohlson) Mr. Ohlson’s testimony is consistent with his analysis of diversions into the Lennep Ditch for 2003. (Exhibit A-7)

**7a. Finding.** I find that the 12 acres proposed to be removed from irrigation have not been irrigated or fully irrigated in dry years. I find that the 12 acres proposed to be removed from irrigation could only have been irrigated when the entire 38.3-acre parcel was irrigated. Therefore, based on Finding of Fact No. 6, I find that the 12-acre parcel has not been irrigated in dry years.

**7b. Discussion.** The Applicant asserted that the 12 acres proposed to be removed from irrigation were subirrigated from ditch seepage from the gravelly portion of the ditch, and used to grow grass for grazing. Testimony indicated that these acres were subirrigated when there was adequate water to run around the field. (Testimony of Otto Ohlson, Richard Berg.) The 12 acres proposed to be removed were not irrigated in 2003. (Testimony of Otto Ohlson.) There is conflicting evidence as to whether these acres were ever irrigated. The *1950 Meagher County Water Resources Survey* did not show that these acres were irrigated. (Department file) Andy Brummond concluded from his review of a 1999 orthophoto that only 26.3 acres were irrigated. (Department file) There are differing interpretations of a 9/17/1979 aerial photo. (Department file, testimony of Andy Brummond, Otto Ohlson)

#### **Adverse Effect**

**8a. Finding.** The Applicant did not make a *prima facie* case that the use of existing water rights will not be adversely affected. I find that the consumption of water will increase if the



1 proposed change is authorized and the use of the existing water rights of other persons may be  
2 adversely affected.

3 **8b. Discussion.** It is important to note that Applicant proposes to implement the proposed  
4 change in dry years and to continue current practice in other years. (See Finding No. 4.)

5 I found that the Applicant has not been able to irrigate or fully irrigate the 38.3-acre  
6 parcel (26.3 acres to be irrigated and 12 acres to be removed from irrigation) that is the subject  
7 of this application in dry years. (See Findings of Fact Nos. 6 and 7.) Using the proposed  
8 supplemental point of diversion will result in full irrigation of 26.3 acres that have not been  
9 irrigated or fully irrigated in dry years. Consequently, the consumption of water will increase if  
10 the proposed change is authorized. Although testimony by Otto Ohlson implies that Applicant  
11 would irrigate the proposed 26.3-acre parcel in place of some other acres “above,” the Applicant  
12 has not proposed to remove any acres from irrigation or to reduce the flow rate of water diverted  
13 when the proposed change is implemented.

14 Applicant argues that the proposed change will save 118 acre-feet of water because  
15 water would not be traveling down 9,000 feet of ditch. Therefore, 118 acre-feet of water would  
16 not be used to grow grass in the ditch, along the ditch banks, and on 12 acres of subirrigated  
17 land.<sup>2</sup> (Testimony of Otto Ohlson) I do not find Applicant’s argument to be convincing for the  
18 following reasons. I found that Applicant has not always been able to irrigate the 38.3-acre field  
19 in dry years and, therefore, I am not convinced that water has been flowing in the section of the  
20 ditch that serves this field in dry years. (See Findings Nos. 6 and 7.) Water that has not been  
21 flowing in the ditch and irrigating and subirrigating the land in dry years is not available to be  
22 “saved.” Furthermore, the estimate of the water saved is derived from Farm Irrigation Rating  
23 Index (FIRI) calculations that assume full irrigation to grow alfalfa and grass. Testimony  
24 indicates that full irrigation of this field does not occur in dry years. (Testimony of Otto Ohlson)  
25 Furthermore, Applicant assumed but did not prove that the amount of water needed for full  
26 irrigation of grass and alfalfa is also consumed in order to subirrigate the 12 acres proposed to  
27 be removed from irrigation or to grow plants on the 4.13 acres that Applicant argues are  
28 associated with the ditch. Testimony indicates that the 12 acres proposed to be removed from  
29 irrigation have been used to grow grass for grazing.

30 Applicant argues that downstream water users will benefit because water diverted into  
31 the Thomas ditch will return to the river more immediately than water diverted into the Lennep

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<sup>2</sup> Applicant’s estimate of the amount of water saved is based on the following assumptions. The ditch is 9,000 feet long and 20 feet wide. Applicant calculated the ditch comprises 4.13 acres. Furthermore, Applicant assumes 12 acres will not be subirrigated from this portion of the ditch. 12 acres + 4.13 acres = 16.13 acres. The irrigation requirement is 19 inches and the conveyance efficiency is 21.8%.

ditch. (Testimony of Otto Ohlson) I am not convinced by this argument for the following reasons. An analysis was not presented to prove that water returning to the river immediately would be a benefit to other water right holders in comparison with current conditions. Mr. Ohlson testified that return flows are minimal during dry years. Mr. Berg testified that much of the return flow from the Lennep Ditch flowed into the Thomas Ditch. No data or calculations were submitted to show that the return flow directly from the Thomas Ditch would be greater than that from the Thomas Ditch by way of the Lennep Ditch. Finally, the consumptive use of water will be increased with the proposed change. (See Finding No. 8).

Applicant argues that any increase in consumptive use due to greater crop production will be insignificant. However, the Applicant asserts that the proposed change is beneficial, even though the irrigation scheme that is proposed for dry years will be more expensive to operate than the historic scheme. (Testimony of Otto Ohlson) The increase in consumptive use of water provides a benefit to the Applicant that is significant enough that he would choose to incur greater costs. In light of these circumstances and Findings of Fact Nos. 6 and 7, I am not convinced that the increase in consumptive use of water would be insignificant to other water right holders.

**9a. Finding.** I do not find that Objector Goffena will be adversely affected by the proposed change. I find that there are water rights other than Mr. Goffena's that could be affected by the proposed change.

**9b. Discussion.** Mr. Goffena testified that, if Mr. Berg left the water proposed to be changed in the stream, the chances of it getting to him are slim. I am convinced by his testimony. Mr. Goffena argued that the water would be managed according to priority dates and, accordingly, an increase in consumptive use of water would affect his water right. However, Objector Goffena did not provide an analysis to prove that his water right would be affected.

Testimony indicated there were numerous water rights downstream from Mr. Berg's proposed point of diversion and that water right holders could divert water subject to the change if Mr. Berg left the water in the river. (Testimony of Otto Ohlson) Water right holders in the Musselshell River Basin have been unable to exercise their water rights in recent years. (Department file, testimony of Richard Haxton, Terri Hice, Keith Svenstad)

#### **Adequacy of Appropriation Works**

**10.** I find that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The proposed point of diversion is the Thomas Ditch, which has been used for many years to supply other water rights with flow rates in excess of the

requested 2 cfs and has the capacity to carry the additional 2 cfs. The diversion consists of a concrete diversion dam and concrete box type outlet, both controlled with flashboards and collapsible jacklegs. The diversion has a measuring device. The Thomas ditch will carry the flows (up to 2 cfs) proposed to be changed to a portable diesel pump and a traveling big gun sprinkler. (Department file)

#### **Beneficial Use**

11. I find the proposed use of water is beneficial to the appropriator. Applicant proposes to irrigate 26.3 acres. (Testimony of Richard Berg) Applicant's ability to apply water to the 26.3 acres, which is one of Applicant's better fields, would be improved during dry years. (Testimony of Otto Ohlson)

12. I find that the 2 cfs flow rate proposed and a volume of 117 acre-feet per year are the reasonable amount necessary to accomplish the proposed use without waste. The Applicant needs to divert 2 cfs in order to have sufficient water to run the pump to apply water to the field. (Testimony of Richard Berg) The FIRI calculations prepared by Mr. Ohlson and submitted with the application showed that 171 acre-feet per season would be needed to irrigate 38.3 acres, assuming an annual net irrigation requirement of 19 inches. An irrigation demand of 19 inches is reasonable for dry years in climatic zone 4. (Department file and Exhibit A-3) The FIRI method is used by the Natural Resources Conservation Service (NRCS) to determine irrigation water needs. The volume of water required to irrigate 26.3 acres may be reduced in proportion to the reduction in acres irrigated. (Testimony of Otto Ohlson) I calculated that 117 acre-feet per year is a reasonable volume.<sup>3</sup>

#### **Possessory Interest**

13. I find that the Applicant has a possessory interest in the property where the water is to be put to beneficial use. Applicant affirmed possessory interest in the affidavit included in his application. (Department file)

#### **Salvaged Water**

14. Applicant did not apply to salvage water. (Department file) The Hearing Examiner announced this at the beginning of the hearing and stated that the criterion related to salvage water would not be an issue during the hearing. Applicant did not assert that salvage water was applied for. Applicant's argument that water would be "saved" with the proposed change was considered to be an argument related to adverse effect. See Finding of Fact No. 8.

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<sup>3</sup>  $26.3 \text{ acres} \div 38.3 \text{ acres} = .687$ ;  $.687 * 171 \text{ acre-feet} = 117 \text{ acre-feet}$

1    **Water Quality**

2    **15.**    No valid objections related to adverse effect on the water quality of an appropriator were  
3    received by the Department. (Department file)

4    **16.**    No valid objections related to the ability of a discharge permitholder to satisfy effluent  
5    limitations of a permit were received by the Department. (Department file)

6  
7           Based upon the foregoing Findings of Fact and upon the record in this matter, I make  
8    the following:

9                                   **CONCLUSIONS OF LAW**

10   **1.**     The Department has jurisdiction to approve a change in appropriation right if the  
11   appropriator meets the requirements of Mont. Code Ann. § 85-2-402.

12   **2.**     The Department shall approve a change in appropriation right if the appropriator proves  
13   by a preponderance of evidence that the proposed change in appropriation right will not  
14   adversely affect the use of the existing water rights of other persons or other perfected or  
15   planned uses or developments for which a permit or certificate has been issued or for which a  
16   state water reservation has been issued; except for a lease authorization pursuant to Mont.  
17   Code Ann. § 85-2-436, a temporary change authorization for instream use to benefit the fishery  
18   resource pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant to Mont. Code Ann. §  
19   85-2-439 when authorization does not require appropriation works, the proposed means of  
20   diversion, construction and operation of the appropriation works are adequate; the proposed  
21   use of water is a beneficial use; except for a lease authorization pursuant to Mont. Code Ann. §  
22   85-2-436 or a temporary change authorization pursuant to Mont. Code Ann. § 85-2-408 or Mont.  
23   Code Ann. § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a  
24   possessory interest, or the written consent of the person with the possessory interest, in the  
25   property where the water is to be put to beneficial use; if the change in appropriation right  
26   involves salvaged water, the proposed water-saving methods will salvage at least the amount of  
27   water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior  
28   appropriator will not be adversely affected; and the ability of a discharge permitholder to satisfy  
29   effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a)  
30   through (g).

31   **3.**     The Applicant has not proven by a preponderance of evidence that the use of existing  
32   water rights of other persons or other perfected or planned uses or developments for which a  
33   permit or certificate has been issued or for which a state water reservation has been issued will  
34   not be adversely affected. (Mont. Code Ann. § 85-2-402(2)(a))

1 In a change proceeding, it must be emphasized that other appropriators have a vested  
2 right to have the stream conditions maintained substantially as they existed at the time of their  
3 appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert  
4 E. Beck, 2 Waters and Water Rights, § 14.04(c) (1991 ed., 2001 repl. vol.); W. Hutchins,  
5 Selected Problems in the Law of Water Rights in the West 378 (1942).

6 Montana's change statute simply codifies western water law. One commentator  
7 describes the general requirements in change proceedings as follows:

8 Perhaps the most common issue in a reallocation dispute is  
9 whether other appropriators, especially junior  
10 appropriators, will be injured because of an increase in  
11 the consumptive use of water. Consumptive use has been  
12 defined as "diversions less returns, the difference being  
13 the amount of water physically removed (depleted) from the  
14 stream through evapotranspiration by irrigated crops or  
15 consumed by industrial processes, manufacturing, power  
16 generation or municipal use." An appropriator may not  
17 increase, through reallocation or otherwise, the historic  
18 consumptive use of water to the injury of other  
19 appropriators. In general, any act that increases the  
20 quantity of water taken from and not returned to the source  
21 of supply constitutes an increase in historic consumptive  
22 use. As a limitation on the right of reallocation,  
23 historic consumptive use is an application of the principle  
24 that appropriators have a vested right to the continuation  
25 of stream conditions as they existed at the time of their  
26 initial appropriations.

27 Robert E. Beck, 2 Water and Water Rights, supra, at § 14.04(c)(1)

28 The applicant in a change proceeding in Montana must prove the historic beneficial use  
29 of the water to be changed. (In the Matter of Application to Change a Water Right No. 411-  
30 30002512 by Brewer Land Co., LLC, Final Order, February 20, 2004) In Pueblo West  
31 Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955 (Colo.  
32 1986), the court held:

33 [O]nce an appropriator exercises his or her privilege  
34 to change a water right ... the appropriator runs a real  
35 risk of requantification of the water right based on actual  
36 historical consumptive use.  
37

38 The requirements of Montana's change statute have been litigated and upheld in In re  
39 Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425, 816 P.2d  
40 1054 (1991)(applicant for a change of appropriation has the burden of proof as to the  
41 nonexistence of adverse impact; the application was properly denied because the evidence in  
42 the record did not sustain a conclusion of no adverse effect and because it could not be  
43 concluded from the record that the means of diversion and operation were adequate).

Prior to the amendment of Mont. Code Ann. § 85-2-402 in 1985 (Ch. 573, 1985 Montana Session Laws), the burden of proof in a change proceeding was on the person claiming the change adversely affected their water right, although the law was the same in that an adverse effect to another appropriator was not allowed. Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes, 18 Mont. 216, 44 P. 959 (1896)(after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in place of use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

In a change proceeding, the consumptive use of the historical right has to be determined:

Expected consumptive use after a reallocation may not exceed historic consumptive use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow rate of the reallocated water is decreased so that actual historic consumptive use is not increased.

2 Water and Water Rights, supra, at § 14.04(c)(1)

(See also In the Matter of Application to Change a Water Right No. 411-30002512 by Brewer Land Co., LLC, Proposal for Decision, November 6, 2003.)

In this matter, Applicant has not met Applicant's initial burden to show that the use of existing water rights will not be adversely affected. Applicant did not show that the consumptive use of water would not increase under the proposed change. (See Findings of Fact Nos. 8 and 9.)

4. The Applicant has proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b). (See Finding of Fact No. 10.)

5. The Applicant has proven by a preponderance of evidence the proposed use of water is a beneficial use of water. Mont. Code Ann. § 85-2-402(2)(c). (See Finding of Fact No. 11.)

6. The Applicant has proven by a preponderance of evidence that a diversion of 2 cfs up to 117 acre-feet per year is the reasonable amount necessary for the proposed beneficial use.

1 Diversion of water to anything but a beneficial use is a waste of water that is prohibited by law.  
2 Mont. Code Ann. §§ 85-2-102(2)(a), 85-2-102(19), 85-2-114, and 85-2-301. (See Findings of  
3 Fact Nos. 4,12.)

4 7. The Applicant has proven by a preponderance of evidence a possessory interest in the  
5 property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-402(2)(d). (See  
6 Finding of Fact No. 13.

7 8. The application does not involve salvaged water. Mont. Code Ann. § 85-2-402(2)(e).  
8 (See Finding of Fact No.14.)

9 9. The criteria in Mont. Code Ann. § 85-2-402(2)(f) and (2)(g) do not apply because no  
10 valid objections were received. Mont. Code Ann. § 85-2-402(3). (See Findings of Fact Nos.  
11 15,16.)

12 10. The Department may not grant an authorization to change a water right unless the  
13 Applicant proves all of the applicable criteria in Mont. Code Ann. § 85-2-402 by a  
14 preponderance of the evidence. Applicant has not proven that all of the applicable criteria have  
15 been met. See Conclusion of Law No. 3. Mont. Code Ann. § 85-2-402(2).

16 Based upon the foregoing Findings of Fact and Conclusions of Law, I make the  
17 following:

#### 18 **PROPOSED ORDER**

19 Application to Change a Water Right No. 40A-30005100 is hereby **DENIED**.

#### 20 **NOTICE**

21 This Proposal for Decision may be adopted as the Department's final decision unless  
22 timely exceptions are filed as described below. Any party adversely affected by this Proposal for  
23 Decision may file exceptions and a supporting brief with the Hearing Examiner. The party may  
24 also request an oral argument hearing before the final decision maker. Exceptions, briefs, and  
25 requests for oral argument must be filed with the Department or postmarked by January 27,  
26 2005. Copies must be mailed to all parties by the same date.

27 Parties may file responses and response briefs to any exception filed by another party.  
28 The responses and response briefs must be filed with the Department or postmarked by  
29 February 16, 2005. Copies must be mailed to all parties by the same date.

30 The record is closed in this matter and no new evidence will be considered.

31 No final decision shall be made until after the expiration of the above time periods, and  
32 due consideration of timely oral argument requests, exceptions, responses, and briefs.

33 Dated this 7th day of January, 2005.  
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5 Mary Vandebosch  
6 Hearing Examiner  
7 Department of Natural Resources and Conservation  
8 Water Resources Division  
9 P.O. Box 201601  
10 Helena, Montana 59620-1601





## CERTIFICATE OF SERVICE

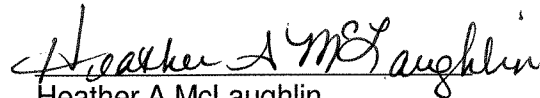
This certifies that a true and correct copy of the First Prehearing Order was served upon all parties listed below on this 7<sup>th</sup> day of January 2005 by first class United States Mail.

BERG RANCH COMPANY  
RICHARD J BERG  
40 BERG RD  
MARTINSDALE MT 59072

OTTO W OHLSON  
PO BOX 358  
WHITE SULPHUR SPRINGS MT 59645

ROBERT GOFFENA  
152 GOFFENA RD  
ROUNDUP MT 59072

DNRC WATER RESOURCES  
LEWISTOWN REGIONAL OFFICE  
613 NE MAIN ST, STE E  
LEWISTOWN MT 59457-2020

  
Heather A McLaughlin  
406.444.6615